Simpang Empat Plantation Sdn Bhd v Ali bin Tan Sri Abdul Kadir & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A–02–139 OF 1997
GOPAL SRI RAM, RAHMAH HUSSAIN JJCA AND VINCENT NG J
1 DECEMBER 2005

Civil Procedure — Judicial precedent — Federal Court — Two decisions of Federal Court — Whether later decision had the effect of overreaching the earlier decision

Civil Procedure — Receiver and managers — Action against — Whether permitting action against receivers and managers would interfere with their function — Whether assets would be imperiled by such action

Civil Procedure — Res judicata — Abuse of the court — Justice of the case — Whether justice of the case lay in reopening issue — Whether reopening of issue would favour or prevent an abuse of process

Land Law — Sale of land — Title of vendor — Vendor having no right to sell land — Whether title could pass to purchaser

The appellant had obtained a loan from the fourth respondent under the security of a debenture and a charge on its land ('the land'). The fourth respondent subsequently recalled the loan and appointed the first three respondents as receivers and managers of the appellant pursuant to the debenture. The appellant's directors then obtained an ex parte injunction to restrain the sale of the land, pending an inter partes hearing. On 23 December 1993, the inter partes hearing ('the first suit') of the injunction was held. At this first suit, one of the main issues was whether the appellant's directors could bring an action in the name of the appellant-company. The incidental question which formed the main ground of the appellant's challenge was whether the receivers and managers had power to sell the appellant's immoveable property, the subject of a registered charge, pursuant to the power vested in them by the debenture under which they were appointed. However, the High Court found against the appellant's directors on the ground of lack of locus standi and dissolved the injunction. The land was later sold to the fifth respondent and registered in the name of the sixth respondent on 29 September 1994. The appellant's appeal to the Federal Court in respect of this first suit was dismissed on 24 September 1996. No grounds of judgment were given. However, prior to the Federal Court's dismissal of the appeal, the appellant had commenced a second suit on 3 April 1996 ('the second suit'), claiming inter alia, as amended, a declaration that the transfer to the instant sixth respondent purchaser was null and void and of no effect by reason of s 340(2)(b) or alternatively s 340(4)(b) of the National Land Code 1965 ('the NLC'). On 14 March 1997, the High Court struck out this second suit on application by the respondents. The respondents had successfully argued before the High Court judge that the appellant's claim should be struck out on the ground of res judicata. The High Court judge held that he was bound by the decision of the Federal Court. The appellant thus appealed.

Held, allowing the appeal with costs:

(1) On 24 May 1997, the Federal Court decided in *Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 that a chargee of land could not by a contract — and a debenture is a contract — exclude the operation of ss 254 to 265 of the NLC. If *Kimlin* had been decided before the Federal Court handed down its decision in the appeal in respect of the first suit, it would not have decided as it did. Similarly, had the High Court judge heard the application to strike out the amended summons in this second suit after *Kimlin*, he would have refused the application. As a matter of precedent, *Kimlin*, as a later decision, had the effect of overreaching the decision in the first suit (see paras 3–4).

(2) If the second suit was permitted to proceed, it would not favour an abuse of process. In fact, an abuse of process would be favoured rather than prevented by refusing the appellant permission to reopen the issue. There were sufficient facts in the instant case to show that justice favoured the re-opening of the propriety of the sale of the subject land by the first to third respondents as receivers and managers (see paras 7–8).

(3) If the receivers and managers had no right to sell, then no title could ever pass to the purchaser — nemo dat quod non habet. As a matter of essential justice the issues should be re-opened because persons who are not in law entitled to have property must be made to return it (see para 9).

(4) It cannot be said that penalising the receivers and managers for doing an act they were not entitled in law to do — as in selling and transferring the subject land in the instant case — was an interference with their function. It is only a question of making the wrongdoers accountable. On the facts, no question of imperiling the appellant's assets arose in the instant case. If the appellant's summons proceeded to trial and terminated in the appellant's favour, the subject land would return to the appellant. There would be a benefit to the appellant and no peril to the asset (see paras 18–19).

(5) Viewing the facts of the instant case in its totality, it was clear that the justice of the case lay in permitting the summons (the second suit) to proceed and to have the issues reopened (see para 20).

Obiter:

Section 192(2) of the Companies Act 1965 was introduced into the 1965 Act to remedy the grave injustice that exists at common law. Section 192(2) introduces a cause of action that did not previously exist. Being a remedial provision, it is to be interpreted liberally in favour of those in whose favour it operates. Section 305(1) of the Companies Act 1965 is quite distinct from s 192(2). Whereas s 305(1) merely provides a summary method of enforcing pre-existing rights, s 192(2) is remedial in that it creates a new right — a new cause of action — that never existed before. Great caution should therefore be taken when referring to cases decided under s 305(1) or its equipollent provision in other Commonwealth statutes because those cases do not deal with a remedial provision (see para 14).

[Bahasa Malaysia summary

Perayu telah memperoleh satu pinjaman daripada responden keempat di bawah jaminan satu debentur dan satu gadaian ke atas tanahnya ('tanahnya'). Responden keempat kemudiannya cuba mendapat balik pinjaman tersebut dan melantik tiga responden pertama sebagai penerima dan pengurus perayu menurut debentur tersebut. Pengarah perayu kemudian mendapatkan satu injunksi ex parte untuk menghalang jualan tanah tersebut, sementara menunggu, antara lain, perbicaraan. Pada 23 Disember 1993, perbicaraan inter partes ('guaman pertama') berhubung injunksi telah diadakan. Dalam guaman pertama ini, salah satu persoalan utama adalah sama ada pengarah perayu boleh memulakan satu tindakan atas nama perayu-syarikat. Persoalan sampingan yang membentuk alasan utama cabaran perayu adalah sama ada penerima dan pengurus mempunyai kuasa untuk jual hartanah tak alih perayu, yang merupakan subjek gadaian berdaftar, menurut kuasa yang diberikan kepada mereka oleh debentur yang mana mereka telah dilantik. Namun begitu, Mahkamah Tinggi membuat keputusan tidak menyebelahi pengarah-pengarah perayu atas alasan locus standi yang tidak memadai dan telah membatalkan injunksi tersebut. Tanah tersebut kemudiannya telah dijual kepada responden kelima dan didaftarkan atas nama responden keenam pada 29 September 1994. Rayuan perayu kepada Mahkamah Persekutuan berhubung guaman pertama ini telah ditolak pada 24 September 1996. Tiada alasan penghakiman telah diberikan. Bagaimanapun, sebelum Mahkamah Persekutuan menolak rayuan tersebut, perayu telah memulakan guaman kedua pada 3 April 1996 ('guaman kedua'), menuntut antara lain, seperti yang dipinda, satu deklarasi yang pindahmilik kepada pembeli responden keenam adalah terbatal dan tidak sah dan tidak berkuat kuasa oleh sebab s 340(2)(b) atau secara alternatifnya s 340(4)(b) Kanun Tanah Negara 1965 ('KTN'). Pada 14 Mac 1997, Mahkamah Tinggi telah membatalkan guaman kedua ini atas permohonan oleh responden-responden. Responden-responden telah berjaya berhujah di hadapan hakim Mahkamah Tinggi yang tuntutan perayu patut dibatalkan atas alasan res judicata. Hakim Mahkamah Tinggi memutuskan bahawa beliau terikat dengan keputusan Mahkamah Persekutuan. Perayu dengan itu telah mengemukakan rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Pada 24 Mei 1997, Mahkamah Persekutuan telah memutuskan dalam*Kimlin Housing Development Sdn Bhd v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 yang seorang pemegang gadaian tanah tidak boleh melalui satu kontrak — dan debentur adalah satu kontrak — mengecualikan operasi ss 254 hingga 265 KTN. Jika *Kimlin* telah diputuskan sebelum Mahkamah Persekutuan membuat keputusannya dalam rayuan itu berhubung guaman pertama, ia tidak akan membuat keputusan seperti mana telah diputuskan. Begitu juga, jika hakim Mahkamah Tinggi telah mendengar permohonan untuk membatalkan saman yang dipinda dalam guaman kedua ini selepas *Kimlin*, beliau akan menolak permohonan itu. Sebagai perkara duluan, *Kimlin*, yang merupakan satu keputusan yang dibuat kemudian, mempunyai kesan melampaui batas keputusan dalam guaman pertama (lihat perenggan 3–4).

(2) Jika guaman kedua dibenarkan untuk diteruskan, ia tidak akan menyebelahi satu penyalahgunaan proses. Bahkan, satu penyalahgunaan proses telah berlaku dengan menolak kebenaran perayu untuk membuka semula persoalan itu. Terdapat fakta yang mencukupi dalam kes semasa untuk menunjukkan bahawa adalah adil untuk membuka semula isu kepatutan jualan tanah tersebut oleh responden-responden pertama hingga ketiga sebagai penerima dan pengurus (lihat perenggan 7–8).

(3) Jika penerima dan pengurus tiada hak untuk menjual, maka hak milik tidak boleh dipindahkan kepada pembeli — *nemo dat quod non habet*. Demi keadilan, persoalan-persoalan tersebut patut dibuka semula kerana mereka yang dari segi undang-undang tidak berhak ke atas hartanah tersebut hendaklah memulangkannya (lihat perenggan 9).

(4) Tidak boleh dikatakan bahawa dengan menghukum penerima dan pengurus kerana melakukan satu tindakan yang mereka tiada hak untuk lakukan di sisi undang-undang — seperti menjual dan memindahmilik tanah tersebut dalam kes semasa — sebagai satu campur tangan dengan fungsi mereka. Ia hanya satu persoalan agar pesalah laku itu bertanggungjawab terhadap tindakannya. Berdasarkan fakta, tiada persoalan tentang membahayakan aset-aset perayu telah ditimbulkan dalam kes semasa. Jika saman perayu diteruskan untuk perbicaraan dan dibatalkan kerana menyebelahi perayu, tanah yang dipersoalkan akan dikembalikan kepada perayu. Ia akan memanfaatkan perayu dan tidak membahayakan aset tersebut (lihat perenggan 18–19).

(5) Setelah meneliti fakta-fakta kes semasa secara keseluruhan, adalah jelas bahawa keadilan kes terletak dalam kebenaran untuk meneruskan saman itu (guaman kedua) dan untuk membuka semula persoalan-persoalan tersebut (lihat perenggan 20).

Obiter:

Seksyen 192(2) Akta Syarikat 1965 telah diperkenalkan dalam Akta 1965 untuk meremedikan ketidakadilan yang wujud dalam common law. Seksyen 192(2) memperkenalkan satu kausa tindakan yang sebelum ini tidak wujud. Sebagai satu peruntukan berbentuk remedi, ia hendaklah ditafsirkan secara liberal memihak kepada mereka yang ia menyebelahi. Seksyen 305(1) Akta Syarikat 1965 agak berbeza dengan s 192(2). Manakala s 305(1) hanya memperuntukkan satu ringkasan cara menguatkuasakan hak-hak yang wujud sebelumnya, s 192(2) bersifat remedial di mana ia boleh membentuk hak baru — satu kausa tindakan baru — yang tidak pernah wujud sebelumnya. Hendaklah bersikap berjaga-jaga apabila merujuk kes-kes yang diputuskan di bawah s 305(1) atau peruntukan yang sama dalam statut-statut Commonwealth lain kerana kes-kes tersebut tidak mempunyai peruntukan remedi (lihat perenggan 14).]

Notes

For cases on Federal Court, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 473–476.

For cases on receiver and managers, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1923–1924.

For cases on res judicata, abuse of the court, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1957–1959.
For cases on title of vendor, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4040–4052.

Cases referred to

AC Willis v Imn Willis & Eh Hodgson [1941] MLJ 169 (refd)
B Johnson & Co (Builders) Ltd, Re [1955] 1 Ch D 634 (refd)
Cavendish Bentinck v Fenn (1887) 12 App Cas 652 (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346 (refd)
K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v Mbf Finance Bhd & Anor [2005] 2 MLJ 201 (refd)
Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)
Newhart Developments Ltd v Co-operative Commercial Banks Ltd [1978] 1 QB 814 (refd)
Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp (No 2) [2003] 3 SLR 217 (refd)
Tan Ah Teck (t/a Plumcon Plumbing & Construction Co) v Coffral (Malaysia) Sdn Bhd [1992] 1 MLJ 553 (refd)

Legislation referred to

Companies Act [Ghana]
Companies Act [Sing] s 192(2)
Companies Act 1862 [UK] s 165
Companies Act 1965 ss 4(1)(b), 192(2), 305(1)
Companies Ordinance 1924
Companies Ordinance 1940
Courts of Judicature Act 1964 s 42
National Land Code 1965 ss 254–265, 340(2)(b), 340(4)(b)

Appeal from: Originating Summons No 24–54 of 1996 (High Court, Ipoh)

L Sabapathy (Tharminder Singh and Wong Guo Bin with him) (Logan Sabapathy & Co for the appellant.
Leong Kok Keong (Kean Chye & Sivalingam) for the first, second and third respondents.
Mohd Ariff bin Yusof (Joyce Uma Segajananthan with him) (Cheang & Ariff) for the fourth respondent.
Kerpal Singh (Bachan & Kartar) for the fifth and sixth respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This case has a history which concerns the decision an earlier suit brought by the instant appellant. The learned judge set it out in his judgment. I need only quote him:

> 1 The plaintiff, as registered owner of the said land had in 1990 obtained a loan from the fourth defendant for RM2.5 million under a security of a debenture and a NLC charge on the said land.

2 In May 1992, the fourth defendant recalled the loan and appointed the first three defendants as receivers and managers of the plaintiff pursuant to the debenture.

3 On 11 August 1992, the receivers and managers called for tenders to sell the said land. On 24 September 1992, the only two directors, in the name of the plaintiff company, sought and obtained an ex parte injunction against the defendants to restrain the sale, pending an inter partes hearing.

4 On 8 September 1992, the fifth defendant had made an offer to purchase the said land for RM4 million.

5 On 23 December 1993, the High Court at the inter partes hearing of the injunction, found for the defendants on the issue of the directors' lack of standing to institute the suit in *Simpang Empat (No 1)*. The Federal Court dismissed the plaintiffs appeal on 24 September 1996.

6 Subsequently, a sale of the said land was concluded with the fifth defendant for RM4.8 million. The said land was thereafter registered in the name of the sixth defendant on 29 September 1994.

[2] Now, one of the main — if not the only — issue in the earlier suit was whether the appellant's directors could bring an action in the name of the company against the defendants in that suit. The incidental question which formed the main ground of the instant appellant's challenge in the earlier suit was whether the receivers and managers had power to sell the appellant's immoveable property, the subject of a registered charge, pursuant to the power vested in them by the debenture under which they were appointed. That is why the directors sought and obtained an ex parte injunction restraining the sale, which injunction was dissolved later by the High Court on grounds of locus standi. That issue was not decided by the Federal Court which gave its following decision:

> After considering submissions by both counsel and the facts and circumstances of the case, we are of the unanimous view that the appeal be dismissed with costs to the respondents to be taxed if not agreed. Deposit to account of costs.
>
> The appointment of receivers pursuant to a debenture does not, in itself, prevent the directors of the company creating the debenture from pursuing a right of action. The directors can pursue if in doing so, it would be in the interest of the company and would not impinge prejudicially upon the position of the debenture holders by threatening or imperiling the assets which are subject of the charge. Much depends on the facts and circumstance of the each case.
>
> In the present case, it has not, in our view, been shown that the action would benefit the company thereby justifying the action. Also, the directors had not given indemnity for costs. The appeal is dismissed.

[3] No grounds of judgment were, however, delivered. But I must draw attention to certain parts of the relevant chronology as it has an important bearing on the outcome of this appeal. As you may have noticed, the decision of the Federal Court in the earlier suit was given on 24 September 1996. The originating summons in the present action (I shall call it 'the second suit'), as amended, is dated 3 April 1996, that

is to say, some five months before that decision. The learned judge in the present case made an order striking out the second suit on 14 March 1997. He delivered his written grounds of judgment on 3 May 1997. On 24 May 1997, the Federal Court handed down its landmark decision in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805. That case held that a chargee of land could not by a contract — and a debenture is a contract — exclude the operation of ss 254 to 265 of the National Land Code 1965 ('the Code'). In his judgment, Edgar Joseph Jr FCJ said this:

> In our view, therefore, the provisions of the Code as to the rights of chargors are designed for their protection and cannot be waived; nor can the chargor contract himself out of the Code. It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owner.

[4] There can be little or no doubt that if *Kimlin* had been decided before the Federal Court handed down its decision in the appeal in respect of the first suit, it would not — indeed it could not — have held that any judgment in favour of the instant appellant in the first suit would not have benefited it. This is because if there was no power in the receivers and managers (the instant first to third respondents) to sell the land in question, the purported sale would have been set aside thereby reverting the land to the appellant. So too, had the learned judge heard the application to strike out the amended summons in the present instance after *Kimlin*, he would have refused the application. Again, because, as a matter of precedent, *Kimlin* as a later decision, had the effect of overreaching the decision in the first suit.

[5] In its amended originating summons, the appellant sought, inter alia, a declaration that the transfer to the instant sixth respondent purchaser was null and void and of no effect by reason of s 340(2)(b) or alternatively s 340(4)(b) of the Code. The ground on which they relied was that there was a restriction on the title which had been transferred to the sixth respondent who, incidentally, was not a party to the first suit. The instant respondents successfully argued before the learned judge that the appellant's claim should be struck out on the ground of res judicata. The learned judge held that he was bound by the decision of the Federal Court and, as I have already said, struck out the second suit.

[6] The first point that has to be decided is whether res judicata applies here. In order to do that, it is, I think, desirable to remind myself of the nature and ambit of the doctrine. In *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, this court had occasion to discuss these points. And I quote (at pp 356–358):

> Now, res judicata is not merely a technical rule of pleading. It is a doctrine of substantial justice. It is a process whereby justice is achieved procedurally by precluding a party from re-agitating in subsequent proceedings a complaint or an issue that has, or could fairly have been disposed in earlier proceedings between the same parties or their privies. It is merely

equity in action in the procedural arena. It is sometimes referred to as the rule in *Henderson v Henderson* (1843) 67 ER 313. In that case, Wigram VC said:

> In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The doctrine may thus be seen to encompass several categories. In its narrowest sense, res judicata, I think, refers to estoppel by record. It refers to the actual decision of the earlier action or proceeding. In its wider sense, it encompasses issues and causes of action that could justly and fairly have been equally adjudicated in the earlier suit or proceeding. This wider operation of the doctrine is sometimes referred to 'constructive res judicata'. It houses the twin concepts of issue estoppel and cause of action estoppel. Like the tree of which they form the branches, they are designed to ensure that there is finality in litigation.

Pausing for a moment, I think that it is essential to bear in mind that Wigram VC spoke these words in the Court of Chancery, and that the court he referred to was that court of which he was the Vice Chancellor at the time. I make mention of these matters in order to demonstrate that the doctrine of res judicata has its roots in equity and hence retains its discretionary nature that is common to all equitable doctrines.

Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.

In *Carl-Zeiss Stiftung v Rayner and Keeler Ltd & Ors (No 2)* [1966] 2 All ER 532 at p 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case [1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21)). *All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.* (Emphasis added.)

In *Arnold v National Westminster Bank Pic* [1991] 2 AC 93 at p 109, Lord Keith of Kinkel expressed the following view:

> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those

> proceedings. *One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result*, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss case* [1966] 2 All ER 536; [1967] 1 AC 853 at p 573, at p 947. (Emphasis added.)

In a later passage, I find Lord Keith saying:

> Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the respondents permission to reopen the disputed issue.

These views were very recently reaffirmed by the House of Lords in *Johnson v Gore Wood & Co* [2001] 1 All ER 481. See in particular the speech of Lord Bingham of Cornhill, at pp 8–10 of the transcript.

On the authorities discussed thus far, the principle comes to this. Whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies.

[7] So the question that is to be asked here is this: if the second suit is permitted to proceed will it favour an abuse of process? In my judgment it will not. Indeed, I am satisfied that abuse of process would be favoured rather than prevented by refusing the appellant permission to reopen the issue. I will explain why

[8] As I have already said, the effect of *Kimlin* is that the first to the third respondents had no power to deal with the subject property — the sole landed asset of the appellant — in the way in which they did. The fourth respondent should have resorted to the provisions of the Code to have the land sold off to satisfy the debt owed it. It did not. Having read the voluminous appeal record in this case more than once, it seems not unreasonable to reach the very tentative conclusion that at all material times the first to the third respondents were acting on the dictation of the fourth respondent. So, if a wrong was committed, they were all parties to it. I am not for a moment to be taken as saying that a wrong or an injustice was done in this case. All I am saying is that there are sufficient facts here to show that justice favours the re-opening of the propriety of the sale of the subject land by the first to third defendants as receivers and managers.

[9] That brings me to the other respondents, in particular the sixth respondent. If the receivers and managers had no right to sell, then no title could ever pass to the purchaser — nemo dat quod non habet. That has been settled by the judgment of Wan Yahya SCJ in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 where he said (at p 309):

> A purchaser of land might fail to obtain a good title in two distinct ways. Firstly, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule, is that no person can give a better

> title than he had — nemo dat quod non habet. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of our National Land Code 1965 where a bona fide purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility — see *Gibbs v Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside.

It follows as a matter of essential justice that the issues should be re-opened because persons who are not in law entitled to have property must be made to return it.

[10] I now come to the submission made by Mr Mohd Ariff Yusof of counsel for the fourth respondent. He says that if the second suit is permitted to proceed, it would amount to an interference with the powers of the first to third respondents as receivers and managers. He relies in support of his submission on the decision of the English Court of Appeal in *Newhart Developments Ltd v Co-operative Commercial Banks Ltd* [1978] 1 QB 814. In fact, counsel for all the instant respondents repeatedly referred us to passages in the judgments in Newhart Developments as if they were some magical incantation. With respect, there is no magic. The principle to be distilled from that case was summed up by Wan Yahya J in *Tan Ah Teck (t/a Plumcon Plumbing & Construction Co) v Coffral (Malaysia) Sdn Bhd* [1992] 1 MLJ 553 at pp 558–559 in the following passage with which I am entirely in agreement:

> The appointment of a debenture holder receiver even with authority to act as agent of the company does not operate to terminate the director's control of service with the company unless such appointment of receiver is inconsistent with the continued employment of a managing director — see *Griffiths v Secretary of State for Social Services* [1973] 3 All ER 1184. In *Newhart Developments Ltd v Co-operative Commercial Banks Ltd* [1978] 1 QB 814, it was held that a provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with the capacity to bring such an action, and did not divest the company's directors of their power... provided that the proceedings did not interfere with the receiver's function of getting in the company's assets or prejudicially affect the debenture holder by imperiling the assets.

[11] Learned counsel for the fourth respondent submits that if we were to permit the second suit to proceed it would interfere with the receivers' functions in getting in the assets of the appellant and that it would prejudicially affect the fourth respondent debenture holder by imperiling the appellant's assets. With respect, I think that nothing could be further from reality.

[12] In the first place, under our company law the first to third respondents as receivers and managers are liable for any misfeasance on their part. Let me digress for a moment to discuss the law on the point. The relevant provision is s 192(2) of the Companies Act 1965 ('the 1965 Act') which was drawn to the attention of all counsel before us during argument. This is what that subsection says:

> If it appears that any receiver or manager of the property of a company has misapplied or retained or become liable or accountable for any money or property of the company or

A being guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may, on the application of any creditor or contributory or of the liquidator, examine into the conduct of the receiver or manager and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just.

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[13] The section is new. It was not in the Companies Ordinance 1924 or the Companies Ordinance 1940 of Malaya. It has no parallel in the United Kingdom, Australia, New Zealand, Canada and India. As presently advised it is only to be found in the Singapore Companies Act (Cap 50, 1994 Rev Ed) and the Ghanaian Companies Act. The section has not been judicially considered in either Malaysia or Singapore. I am not aware whether the courts of Ghana have had any occasion to discuss the section.

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D **[14]** The section is remedial. It was introduced into the 1965 Act to remedy the grave injustice that exists at common law (which term I use to include the doctrines and principles of equity). At common law, a receiver and manager appointed under a power conferred by a debenture does not stand in a fiduciary position to the borrower company over whose property and affairs he exercises control. Nor does he or she owe any general duty to the borrower company (see *Re B Johnson & Co (Builders) Ltd* [1955] 1 Ch D 634). His or her primary duty is to the debenture holder (see *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp (No 2)* [2003] 3 SLR 217. (It is to be noted, however, that s 192(2) of the Singapore Companies Act was not referred to the Court of Appeal by counsel on either side in that case.) Such a receiver and manager is also not an officer of the borrower company as defined by s 4(1)(b) of the 1965 Act (see *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v Mbf Finance Bhd & Anor* [2005] 2 MLJ 201). That means that he or she does not come within s 305(1) of the 1965 Act to which I will refer shortly. So, at common law, a receiver and manager appointed under a debenture could destroy the borrower company in all sorts of ways and there is nothing that the shareholders or creditors or the liquidator of that company could do. They are helpless. Section 192(2) remedies that by introducing a cause of action that did not previously exist. Being a remedial provision, it is to be interpreted liberally in favour of those in whose favour it operates (see *AC Willis v Imn Willis & Eh Hodgson* [1941] MLJ 169).

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H **[15]** Now, I must make mention of s 305(1) of the 1965 Act which does have equipollents in other Commonwealth jurisdictions. Section 305(1) (the relevant words of which are in pari materia with s 192(2) I have underlined) reads as follows:

I (1) If in the course of winding up it appears that any person who has taken part in the formation or promotion of the company or any past or present liquidator or officer *has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may on the application of the liquidator or of any creditor or contributory examine into the conduct* of that person, liquidator or officer and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just, or to

contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just. (Emphasis added.)

[16] In *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652, Lord MacNaghten, when discussing s 165 of the United Kingdom Companies Act 1862, which is ipsissima verba our s 305(1) said that the section:

creates no new offence and *gives no new rights*, but that it only provides a summary and efficient remedy for rights which, apart from that section, might have been vindicated either at law or in equity. (Emphasis added.)

[17] The words in the above quoted passage upon which I have placed emphasis are what set s 305(1) apart from s 192(2). Whereas the former merely provides a summary method of enforcing pre-existing rights, the latter is remedial in that it creates a new right — a new cause of action — that never existed before. It is therefore my judgment that great caution should be taken when referring to cases decided under s 305(1) or its equipollent provision in other Commonwealth statutes because those cases are not dealing with a remedial provision.

[18] Returning to the present case, it cannot by any stretch of the imagination be said that penalising the receivers and managers for doing an act, namely selling and transferring the subject land, they were not entitled in law to do is hardly an interference with their function. If that were so every wrongdoer will have a carte blanche. So there is really no interference at all. It is only a question of making the wrongdoers accountable. And that is quite in order

[19] Secondly, no question of imperiling the appellant's assets arises here. Quite the opposite. If the appellant's summons proceeds to trial and terminates in the appellant's favour, then the subject land returns to the appellant. There is a benefit to the appellant and no peril to the asset.

[20] Taking a step back once again and viewing the facts of this case in its totality, it is clear that the justice of the case lies in permitting the summons to proceed and to have the issues re-opened. Of course, as appeared during argument, the originating summons may have to be suitably amended to add one or more of the appellant's shareholders as co-plaintiffs. If need be, further affidavit evidence may be put in to support the *Kimlin* ground of complaint. I say 'if need be' advisedly because this is really a point of law that arises logically from the facts already pleaded.

[21] For the reasons already given, this appeal succeeds. The orders of the High Court are set aside. The amended originating summons is restored to file and remitted to the High Court for mention before the judge in chambers on a date and at a time that will be fixed upon delivery of this judgment with a direction for the judge to fix an early date for the hearing and disposal of the matter. The appellant will have all its costs here and in the court below. The taxing registrar in this court and in the court below is directed to allow only one item of getting up in the

appellant's bill. The appellant shall, however, be given all its profit costs and out of pockets as separately incurred against each respondent. The deposit in court shall be refunded to the appellant.

[22] My learned brother Vincent Ng J has seen this judgment in draft and has expressed his agreement with it.

[23] I must add by way of postscript that this appeal was heard by a Bench of this court which included my learned sister Rahmah Hussein JCA who has since retired. This judgment is accordingly delivered pursuant to s 42 of the Courts of Judicature Act 1964 as amended.

Appeal allowed with costs.

Reported by John Paul Simon